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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK, *Appellants*,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, *Appellee*,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN, *Intervenor-Appellees*.

BRIEF FOR AMICI CURIAE

National Catholic Educational Association
Lutheran Education Association
National Union of Christian Schools
National Conference of Yeshiva Principals

Of Counsel:

F. X. GALLAGHER
Baltimore, Maryland

ALFRED L. SCANLAN
Washington, D.C.

HARMON BURNS
Washington, D.C. 20036

CHARLES M. WHELAN
Fordham Law School
140 West 62nd Street
New York, N.Y. 10029

W. R. CONSEDINE
1312 Massachusetts Ave., N.W.
Washington, D. C. 20005

Attorneys for Amici Curiae

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INTEREST OF THE AMICI CURIAE

The *amici curiae* are national nonprofit educational organizations. They are dedicated to fostering and promoting the principles and ideals of American edu-

cation. They are also dedicated to fostering and promoting the principles and ideals of the American Constitution. In particular they do not want to see the wall of separation between Church and State either dismantled or displaced.

The *amici* are intensely aware that it is their character as religious institutions that is at the heart of the appellants' challenge to the eligibility of almost half-a-million children to participate in the New York textbook-loan program. These children attend the kind of schools represented by the *amici*. Appellants would have the Court think of these schools simply as Sunday schools or as mere catechetical instruments of various denominations. It is the interest of the *amici* to defend themselves and their students against this constitutional caricature.

The *amici* would be the last to deny that their schools impart religious education and formation. That is one of the two principal reasons for their existence. But the other reason is to furnish the basic secular education any child must have to take his place in civil society. Indeed, in most instances, the schools represented by the *amici* organizations not only meet but surpass the standards of secular education specified by the compulsory education laws. There is no constitutional reason why children who attend such schools should be denied participation in general State programs for the improvement of secular educational opportunities.

Forty-three years ago, with the assistance of this Court, two private schools in Oregon vindicated their own constitutional right to exist and the constitutional right of parents to select such schools for the education

of their children.[1] It is the hope of the *amici* today, with the assistance of this Court, to vindicate the right of parents to exercise their constitutional freedom of choice without forfeiting their rights and their children's rights to participate in general State programs of secular educational assistance.

The wall of separation is a wall between Church and State, not between the child and the State. It is in no sense a wall *around* the child in a Catholic, Protestant, Jewish or other denominational school. In the spirit of that conviction, the *amici* submit this brief in support of the judgment of the Court of Appeals of New York.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The clauses of the Constitution drawn in question in this case are the Due Process Clause of the Fourteenth Amendment and, owing to their incorporation in the Fourteenth Amendment, the No Establishment and Free Exercise Clauses of the First Amendment.

The statute involved in this case is Section 701, subdivision 3 of the New York Education Law, as amended, 16 McKinney's Consol. Laws of New York § 701.3. The text of the statute, together with an official explanation of it by Counsel for the Education Department of the University of the State of New York, is set forth in the Brief for Appellants.

STATEMENT OF THE CASE

Since the facts of the case and the decisions of the courts below are carefully reported in the briefs of the parties, the *amici* adopt the statements of the case in those briefs.

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[1] Pierce v. Society of Sisters, Pierce v. Hill Military Academy, 268 U.S. 510 (1925).

QUESTION PRESENTED

The formal questions presented in this case are accurately set forth in the briefs of the parties. In the view of these amici, however, the crux of the case can best be summarized as follows:

Whether precisely because they attend schools

> that furnish as much or more
> than the secular education
> specified by the compulsory education laws
>
> but also furnish religious education
> in a way and of a type
> not permissible in the public schools,

children in grades 7 to 12 who attend such schools

are precluded by the Fourteenth Amendment

> in virtue of its incorporation
> of the No Establishment and Free Exercise
> Clauses of the First Amendment,

from sharing in a New York textbook-loan program

for the secular educational benefit

of all school children in grades 7 to 12.

ARGUMENT

By reviewing this case, the Court has embraced an issue that has occupied the best constitutional minds in the country for the last twenty years.[2] Like other landmark decisions, *Everson* v. *Board of Education*, 330 U.S. 1 (1947), settled important constitutional boundaries but left others for future definition. Interestingly enough, none of the cases this Court has decided since *Everson* has touched the nerve of that decision: the extent to which children attending secularly qualified but religiously affiliated schools may be included in general State programs designed to enhance secular educational opportunities for all school children.

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[2] The literature on the subject is, of course, enormous. The two most recent discussions, both set in the context of a general survey of the Court's decisions in Church-State matters, are Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967), 81 *id.* 513 (1968), and Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L. J. 692 (1968). Among the more notable contributions in the literature of the last ten years are the following: FEDERAL AID AND CATHOLIC SCHOOLS (Callahan ed. 1964); Himmelfarb, *Church & State—How High a Wall?*, 42 COMMENTARY 23 (1966); Howe, THE GARDEN AND THE WILDERNESS, 117-18, 130-31, 137-39, 172-76 (1965); Kauper, *Church and State: Cooperative Separation*, 60 MICH. L. REV. 1 (1961); Kurland, RELIGION AND THE LAW 7-10, 111 (1962); Murray, WE HOLD THESE TRUTHS 143-54 (1960); NCWC Legal Department, *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 GEO. L. J. 397, 411, 437-42 (1961); THE WALL BETWEEN CHURCH AND STATE (Oaks ed. 1963; especially the articles by Drinan, Gordon and Hutchins); United States Department of Health, Education, and Welfare, *Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education*, 50 GEO. L. J. 349, 365-81 (1961).

After having declined several earlier opportunities,[3] the Court has now decided to take up this matter. As it does so, the Court's caution and sense of delicacy in the past are sure proof of its grasp of the complexities of the issue. Standing in the wings of this case are still other suits designed to test the constitutionality of those sections of the Elementary and Secondary Education Act of 1965 (ESEA) that pertain to children in religiously affiliated schools.[4] Moreover, although not yet formally challenged in court, the constitutionality of the National Defense Education Act of 1958 (NDEA) and of the Higher Education Facilities Act

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[3] Snyder v. Town of Newton, 147 Conn. 347, 161 A. 2d 770 (1960), app. dism. 365 U.S. 299 (1961); Swart v. South Burlington Town School District, 122 Vt. 177, 167 A. 2d 514 (1961), cert. den. 366 U.S. 925 (1961); Dickman v. Oregon School Dist. No. 620, 232 Ore. 238, 366 P. 2d 533 (1961), cert. den. sub nom. Carlson v. Dickman, 371 U.S. 823 (1962); Matthews v. Quinton, 362 P. 2d 932 (Alaska 1961), cert. den. 368 U.S. 517 (1962); Horace Mann League of the United States, Inc., et al. v. Board of Public Works, 242 Md. 645, 220 A. 2d 51 (1966), app. dism. and cert. den. 385 U.S. 97 (1966); Rhoades v. School District of Abington Township, 424 Pa. 202, 226 A. 2d 53 (1967), app. dism. 88 S. Ct. 61 (1967); Worrell v. Matters, 424 Pa. 202, 226 A. 2d 53 (1967), cert. den. 88 S. Ct. 36 (1967).

[4] The relevant sections of Titles I; II and III of ESEA may be found at 20 U.S.C. 241a *et seq.* (Supp. II, 1965-1966). The pending cases challenging the constitutionality of these sections, either in principle or as they are being administered, are: Yurick v. School District of Philadelphia (Court of Common Pleas for Philadelphia County, Pa., No. 6266); Smith v. School District of Philadelphia (Court of Common Pleas for Philadelphia County, Pa., No. 3797); Polier v. Board of Education of New York (Supreme Court of the State of New York, County of New York, No. 19540/1966). See also Flast v. Gardner (United States Supreme Court No. 416); Protestants and Other Americans United for Separation of Church and State, et al. v. United States of America, et al. (U.S. 6th Cir. No. 17918); Carpenter v. Gardner (U.S.D.C. E.D. Pa., No. 42818).

of 1963 (HEFA) is also part of the spectrum of academic issues awaiting judicial resolution.[5]

It is essential, therefore, to keep the issue presented by this textbook-loan case sharply in focus and carefully distinguished from the more general problems posed by such Federal statutes as ESEA, NDEA and HEFA. We are dealing in this litigation with the provision of some secular textbooks to every school child in the State of New York in grades 7 to 12, not with assistance to elementary or college and university students, nor with programs designed to provide scholarships, research grants, laboratory equipment, libraries or academic facilities for nonsectarian instruction.

Everson and the Constitutional Context

Analysis of the decisions which this Court has handed down in the field of Church and State shows that the type of governmental action involved in each case falls into three broad categories:

(1) Governmental action deliberately concerned with religion (E.g., prayer in the public schools);

(2) Governmental action deliberately concerned with the regulation of secular interests but which has obvious and unavoidable religious effects (E.g. Sunday closing laws);

(3) Governmental action deliberately concerned with the provision of welfare and educational benefits to the public and which, therefore, may or may not have a significant effect on religious individuals and institutions, depending upon the personal status of the recipients of the benefits and the organizational status of the cooperating agencies (E.g. contracts with sectarian hospitals).

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[5] NDEA, 20 U.S.C. §§ 421 *et seq.*; HEFA, 20 §§ 701 *et seq.*

In the first category, since religion is the direct object of governmental action, the No Establishment Clause has usually proved to be the determinative part of the Constitution. See, for example, *School District of Abington Township, et al.* v. *Schempp, et al.*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Watson* v. *Jones*, 80 U.S. 679 (1872).

In the second category of cases, the fundamental issue is to what extent government may or must grant exemptions on religious grounds from fundamentally secular laws of a criminal, economic, academic or military nature. Accordingly, the clause that has generally proved determinative in this category of cases is the Free Exercise Clause. See, for example, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *McGowan* v. *State of Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Gallagher* v. *Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961); *United States* v. *Ballard*, 322 U.S. 78 (1944); *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1944); *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 264 (1943); *Hamilton* v. *Regents*, 293 U.S. 245 (1934); *Davis* v. *Beason*, 133 U.S. 333 (1890); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

In the third category of cases, the fundamental issue is twofold:

(1) The indirect aid or benefit issue, or to what extent government is precluded from enlisting the as-

sistance of otherwise qualified nongovernmental institutions, precisely because these institutions are also religiously affiliated, for the achievement of secular welfare and educational programs.

(2) The no-discrimination issue, or to what extent the government may or must allow participation to certain individuals in secular welfare and educational programs, regardless of the fact that the only institutions in which these individuals elect to receive or could, as a practical matter, receive the secular benefits are institutions that are both secularly qualified and religiously affiliated.

In this third category of cases, accordingly, both the No Establishment and the Free Exercise Clauses are equally relevant. One forbids aid to religious institutions; the other forbids religious discrimination against individuals. Since religious institutions and religious individuals are inextricably interwoven in our society, any attempt to solve this third category of cases exclusively in terms of one religion clause of the Constitution or the other is doomed to defeat by the Constitution itself. See, for example, *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Cochran* v. *Louisiana State Bd. of Educ.,* 281 U.S. 370 (1930); *Bradfield* v. *Roberts,* 175 U.S. 291 (1899).

It is unmistakably clear that the precise teaching of the *Everson* case is that both religion clauses of the First Amendment are equally relevant in cases involving the third, or welfare, category of governmental action. The famous and oft-affirmed exposition of the No Establishment Clause (330 U.S. at 15) is followed immediately in the text of the opinion by an equally noteworthy exposition of the Free Exercise Clause (330 U.S. at 16).

What split the majority and the minority in *Everson* was the dissenters' insistence that "No aid, nohow, no

matter what" was the absolute command of the Constitution. If a governmental program resulted in any way in benefit to a religious group, that benefit was automatically and unconditionally fatal to the constitutionality of the program. There was, indeed, one exception: If a church was on fire, the firemen were allowed to put it out, not to save the church, but to save the neighboring nonreligious property (cf. 330 U.S. at 60-61). With that single exception, the constitutional prohibition on aid to religion—direct, indirect, proximate, remote, substantial or paltry—was absolute. In the words of Mr. Justice Rutledge:

> "Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small" (330 U.S. at 52).

The majority in *Everson* took a different tack, a tack to which this Court has consistently hewed ever since. The No Establishment Clause does, indeed, forbid all purposeful promotion of religion, but the Free Exercise Clause also forbids denying individuals, because of their religion or lack of it, the right to participate in secular welfare and educational benefits. The majority in *Everson* construed safe transportation to school as a secular benefit because it was "indisputably marked off from the religious function" of the church-related schools (330 U.S. at 18). The State was under no obligation to make this benefit available to children not attending the public schools, but it was within the discretion of the State to extend it, in the interest of the general welfare, to all children who were attending schools that met or surpassed the standards set by the compulsory education laws (330 U.S. at 16).

The Need for Constitutional Development

Even this brief analysis of the *Everson* decision and of the categories of Church-State cases decided by this Court makes it clear that the religious guarantees of the First and Fourteenth Amendments are simple only on their face. The No Establishment and Free Exercise Clauses are self-executing but not self-elucidating. The religious and social complexities of our pluralistic American society have inevitably necessitated elaborate glosses on the constitutional text. In the construction of these glosses, history, logic, custom and the "felt necessities of the times" have all had their part to play.

The reason the Constitution of 1789 still lives is because this Court has kept constitutional law alive. There has been neither radical rupture with the past nor ossification in precedent. For development's sake alone, the appellants' case must fail. When all is said and done, they rely on a single paragraph—indeed, a single sentence—of the *Everson* decision.[6] They rely on it in the sense in which the dissenters, not the majority, would have agreed with it. The Constitution is too complex for the appellants' approach.

While the doctrine of *Everson* is not enough for the appellants to prevail, neither is it enough for the appellees. There is, indeed, much in the *Everson* decision to support the constitutionality of the New York textbook program. It must be conceded, however, that as clear and fundamental as the *Everson* principles are, their simplicity demands close analysis and further elaboration before they can be applied to the complex patterns of religious activity in the United States.

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[6] "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (330 U.S. at 16).

The famous paragraphs in *Everson* explaining the No Establishment and Free Exercise Clauses will always remain the bedrock of American constitutional law. As, however, the decisions of this Court concerning Sunday closing laws and religious exercises in the public schools conclusively show, a great deal more than what *Everson* has to say needs to be said for the proper resolution of the relationships between organized religion and the government. This is not surprising, since so many Church-State issues were not involved or discussed in that case.

For example, it simply is not possible, using only the unadorned *Everson* concepts and principles, to deal adequately with such complicated matters as tax exemptions for religious institutions, Federal aid to all accredited colleges and universities, the expansion of community hospital faclities through the Hill-Burton Act, and the public provision of chaplains in our armed forces, penitentiaries and hospitals. Neither is it possible, using only the unelaborated *Everson* concepts and principles, to deal adequately with the constitutional problems raised by the New York textbook-loan law now before the Court.

It is the suggestion of the organizations filing this *amicus* brief that, in the field of governmental aid to education, American constitutional law needs to put the emphasis on academic and personal freedom. The No Establishment Clause, of course, strongly supports this emphasis. In addition to its indispensable role of keeping Church and State separate, the clause has its own irreplaceable part to play in the cause of academic freedom. In areas, however, where there is a dynamic tension between the no-aid principle of the No Establishment Clause and the no-discrimination principle of the Free Exercise Clause, the enhancement of aca-

demic and personal freedom should provide the decisive weight. In the instant case, there can be no doubt that, all things considered, academic and personal freedom are best served by sustaining the New York textbook-loan law.

Academic and Personal Freedom

Academic freedom has many facets: the freedom of the faculty to teach, of the students to learn, and of the institution to operate. Academic freedom also involves the right of the government to support education. This support can be given by secular means for secular purposes in many different ways, and particularly, as in this case, directly to students. The entry, however, of the government into the support of education immediately raises new problems of academic freedom: the range of permissible regulation of educational institutions; the problem of avoiding the establishment of a political or religious orthodoxy in the schools totally operated by the government; and the designing of programs of public assistance so that governmental support of education does not mean that the government swallows education.

For most students and many of their parents, personal freedom is intimately linked to academic freedom. So much time is spent in school today, and the economic and social future of a child is so closely related to his performance in school, that it may be fairly said that for children of grammar and high school age, academic freedom is one of the most important constituents of personal freedom. Academic freedom is also important to the parents of these children. Education is the primary responsibility and right of the parents, and there can be no variety or choice in education without a high degree of academic freedom for

the schools, the faculties, the students, the government and the parents.

At the grammar school and high school level, about 85 percent of American parents elect to send their children to public schools. For some the choice is dictated by economic necessity; for others—and probably for most—the choice is the result of the dominant American preference for the type of schooling given in the public schools. The other 15 percent, however, of American parents elect to send their children to nonpublic schools, and within this group more than 90 percent elect religiously affiliated schools. Most of the parents who make this choice fall neither in the ranks of the poor nor the ranks of the rich. The value-judgment that leads them to assume the enormous additional financial burden of educating their children outside the public school system is the conviction that compartmentalizing the secular and religious education of children distorts the nature of man and the universe.

The question now before this Court is whether that conviction and choice of the parents forces the State to disqualify those parents and their children from any public educational assistance whatsoever. In short, does the Fourteenth Amendment impose an "All or Nothing" system on the States? Does the Fourteenth Amendment allow the States to assume the total cost of secular education in the public schools, but forbid even a farthing for carefully limited forms of secular assistance to those parents and children unwilling to accept the type of education to which the government is confined in the public schools Does the Constitution compel the States to make the constitutional right to go to a school that interrelates religious and secular education the most expensive academic freedom in America?

It seems to these *amici* that there is nothing in our constitutional or academic traditions to require such a result. In support of that view the following considerations are offered.

State Compulsion Justifies State Assistance

What the State can compel, the State can facilitate. But the State of New York can and does compel parents to send their children in grades 7 to 12 to schools that meet or surpass certain basic standards of secular education. Therefore the State can, by secular means, assist the parents and children to meet the State-imposed secular standards in the schools of their choice.

It is not permissible, of course, for New York to seek to accomplish secular purposes by religious means. The No Establishment Clause forbids that. But the fact that a law has religious effects does not make the law a religious means. The Sunday Closing Law Cases demonstrate that.[7] For a program authorized by law to fall into the category of a religious means to a secular end, the program must make use of the instruments, methods or paraphernalia of religion. The New York textbook-loan law does not do so. The books are secular textbooks in secular branches of knowledge. If a child can convert the program into a religious program by using the book in a religio-secular school, the child can convert the public library into a religious institution by using the library books in the same school.

The Law Has No Religious Effects of Itself

Any religious effect the textbook-loan program has is the result of an individual citizen's choice, not the

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[7] McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 599 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961).

choice of New York. If there were no parents in New York who had decided to send their children to religio-secular schools, there would be no religious effects from the law at all.

When a State is providing assistance to everyone in a certain category, the secular character of the State's program must be judged by what the State does, not by what individual recipients of the assistance do. It would be ridiculous, for example, to assert that the Social Security law results in unconstitutional aid to religion because some of the recipients of the assistance make donations from it to the churches of their choice. A prophet can make a public park his pulpit, but he does not thereby convert the government into a church.

When a State truly accomplishes important secular objectives by methods that eschew religious techniques and trappings, the fact that some individuals elect to utilize the State benefits in religio-secular institutions should not raise insuperable constitutional difficulties. The responsibility for the religious ramifications rests with the individuals involved. There is nothing in the Constitution of the United States that says individual citizens are under an obligation to make certain that secular benefits they receive from the government do not redound in any way to the harm or benefit of religion.

No Government Penalty for Exercise of Constitutional Rights

Under the holding in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), parents have a constitutional right to select a private nonsectarian or religiously affiliated school that meets the secular standards of the compulsory education laws. *Amici* have already urged upon the Court that there is nothing in our constitutional or academic traditions to necessitate a holding that parents, by exercising this constitutional right, forfeit their

and their children's other constitutional right to participate in general State benefits of a secular character.

Assuredly, by electing to send their children to a school that is both secularly qualified and religiously affiliated, parents deliberately waive their right and opportunity to have their children's education provided entirely without cost (other than the taxes the parents may have to pay as taxpayers) by the State. This waiver, however, should not be converted into a waiver of any and all secular benefits provided by the State. As this Court said in the very recent case of *Simmons* v. *United States,* 36 U.S. Law Week 4227, 4231-32 (March 18, 1968):

> "The rule adopted by the courts below does not merely impose upon a defendant a condition which may deter him from asserting a Fourth Amendment objection—it imposes a condition of a kind to which this Court has always been peculiarly sensitive. . . . A defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."

The pressures to which Garrett was subjected in his efforts to protect his liberty were far greater than those imposed on parents by the loss of State aid if they elect to send their children to religio-secular schools. Accordingly, *amici* do not argue that the State *must* supply assistance to children in nonpublic as well as public schools. There may be valid economic, administrative or other policy considerations that would lead a State to channel its educational benefits only through public schools. If, however, a State decides to extend secular educational benefits to all children, regardless of the schools they attend, such a decision certainly ought to be within the constitutional discretion of the State.

The argument that a constitutional right to do something is not a constitutional right to do it at public expense misses the point. In view of the history of American law and education, no one could successfully contend that parents have a right to have the State pay for the education of their children in private schools. But appellants' argument goes much deeper than denying the right of such parents to public assistance: it denies their eligibility. Appellants would write into the Constitution a forfeiture clause as equally unwarranted by our traditions as the claim for compulsory assistance to children in private schools.

No Religious Paralysis of Political Power

The First Amendment was designed not only to keep government out of religion, but also religion out of government. If, however, this proposition is construed to mean that any aid to religious institutions invalidates a governmental program, no matter how secular the program is in concept and execution, we

have the paradox that a rule designed to keep Church and State separate results in a religious paralysis on the exercise of political power.

In a country with as great a variety of religions as our own, it is virtually impossible for the government to do anything that will totally avoid benefit or harm to any religious group. Public birth control programs offend many Catholics. State lotteries offend many Protestants. Conscription laws offend pacifists. The list could be prolonged indefinitely, especially if notice were taken of the smaller sects and the more recently created religious groups such as the League for Spiritual Discovery.

A law that resulted in the total suppression of the religious activities of a particular group would certainly be scrutinized most carefully by this Court. Only the most compelling public necessity could justify such a law. Similarly, a law that resulted in making it possible for a religious organization to function independently of the contributions of its members would also be extremely suspect. Perhaps some extraordinary public crisis could justify such governmental involvement for a short time, but it could never be the order of the day.

Considerably less scrutiny is necessary, however, where the harm or benefit to religion that results from a dominantly secular law is not of a magnitude to suppress a particular religious group or to enable it to carry on its religious functions independently of the voluntary support of its members. In order to accomplish important secular programs, the government has to be given some leeway. Merely making a particular religion easier or more difficult to practice should not be an infallible touchstone of governmental power.

This is all the more true where, owing to the interweaving of religious and secular structures in our society, it simply is not possible for government to achieve its secular purpose of benefiting its citizens without some collateral facilitation of the functioning of religio-secular institutions. Since 15 per cent of all American school children are in nonpublic schools and have a constitutional right to stay there, government cannot possibly assist the secular education of those children without collaterally enhancing the secular dimensions of the schools they attend. It is fruitless to attempt a divorce between the student and the school. The government's right to reach the student necessarily involves the right to have some limited dealings, involving collateral benefits or burdens, with the school that the student attends.

The only benefit that results to religious institutions from the textbook-loan law is an incidental benefit that could not have been avoided consistently with the accomplishment of the secular purpose. Moreover, the benefit is clearly not of a magnitude to make it possible for the religiously affiliated schools in New York to carry on their religious functions independently of the voluntary support of their members. In such circumstances, there is no reason to hold that the collateral benefit to religious institutions invalidates the textbook-loan program.

Contacts Between Public and Religious Authorities

Where the New York statute is properly administered, the institutional contacts between religious and public school authorities are so routine and ministerial as not to contravene the prohibitions of the No Establishment Clause. It is true that this clause was de-

signed to prohibit at the Federal level the kind of institutional involvement between government and religion that characterized England and the American colonies. The Amendment, however, was certainly not designed to cut off all contact between religious groups and public authority.

The religious and public school authorities are already in substantial contact with each other, owing to State regulation of the nonpublic schools. The textbook statute does not add substantially to that contact. The religiously affiliated schools merely cooperate with the secular authorities at the latter's request. If the public school boards wish to deal exclusively with the students, they are free to do so. If they wish to enlist the assistance of the religiously affiliated schools in administering the program, they are also free to do that.

The kind of involvement that the First Amendment forbids is an involvement that entails a sharing of political or religious power. There is absolutely no shadow of such an involvement in the concept or execution of the New York textbook-loan program.

Comments on the Brief for Appellants

If the appellants' interpretation of *Everson* and the First Amendment is correct, the whole course of American constitutional history in the field of Church and State has been wrong. If the New York textbook-loan law is invalid because it results in some collateral aid to religious institutions, far more fundamental and traditional practices in our society would be cast in jeopardy. One need only think of tax exemptions for religious institutions and of the provision of chaplains in our armed forces, hospitals and penitentiaries.

It is possible, of course, to sustain these traditional features of Church-State relationships in American society without endorsing the New York textbook-loan program. But it is not possible on the basis that the textbook law aids religious institutions and that tax exemptions and chaplains do not. Nor is it possible to declare the textbook law unconstitutional without clouding the validity of far more important educational programs such as the National Defense Education Act of 1958, the Higher Education Facilities Act of 1963 and the Elementary and Secondary Education Act of 1965.

It is true that the present case involves only the provision of some secular textbooks to school children in New York. The context and background of the case, however, present a broad spectrum of constitutional issues. These issues do not have to be—indeed they should not be—settled in this litigation, but neither should they be totally ignored.

Appellants would settle all the issues on the basis of a single, simplistic slogan. The complexity and variety of the issues, however, suggest that the intention of the Founding Fathers, the development of American constitutional law, and the realities of modern American religious pluralism all demand a more thoughtful constitutional analysis.

In addition to their No Establishment argument, appellants claim that the Free Exercise Clause protects them against being taxed for the propagation of religious opinions in which they do not believe. The short answer to this is that the Establishment Clause protects them against being taxed even for the propagation of religious beliefs they wholeheartedly accept. The textbook statute, however, is not an expression of support for any religious opinion whatsoever by the State of

New York. Every school child in the State in grades 7 to 12 receives the textbooks. If any religion is aided, so are all religions and non-religions. Any religious effect of the statute is totally the result of an independent and constitutionally protected choice by the parent of a child.

Appellants confuse the fact that it is somewhat easier for all schools, including religiously affiliated schools, to operate as a result of the New York statute with something that is altogether different: an expression of support by New York for religious schools as such. If the mere passage of the law puts New York on the side of the schools attended by the children who benefit by the textbooks, then New York is officially on record as being 85 per cent in favor of public schools and 15 per cent in favor of nonpublic schools. Such a construction of the statute is patently untenable.

There is, however, a deeper danger to the appellants' argument that the Constitution protects individuals against governmental expenditures in support of opinions with which the individuals disagree. Personal opinions are protected against governmental punishment, not governmental disagreement. The government, of course, has no authority to espouse any religious position whatsoever. But if the government is to function effectively in the secular domain, it must be free to support programs (and the political ideas behind those programs) over the objection of dissenting taxpayers. Moreover, owing to the variety of religions in the United States, it may well be that a program conceived by the government and most of the citizens as secular will be regarded by some groups as distinctly religious or anti-religious. If the taxpayer's conscientious objection to a governmental expenditure is given the power of a constitutional veto, we will have adopted

"a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." Cf. *McGowan* v. *Maryland,* 366 U.S. 420, 445 (1961).

Appellants urge that giving assistance to religiously affiliated schools will provide a basis for State regulation of such schools. It seems incredible that appellants are not aware of the considerable extent to which nonpublic schools are already regulated by the States. Governmental authority over such schools derives from society's right to insist upon a basic secular education for every child of school age. It is frivolous of appellants to assert the *possibility* of governmental regulation of non public schools as a bar to secular State assistance to parents who choose secularly qualified and religiously affiliated schools for their children.

CONCLUSION

It is respectfully submitted that, in the interest of academic and personal freedom, the judgment of the Court of Appeals of New York be affirmed.

Respectfully submitted,

CHARLES M. WHELAN
Fordham Law School
140 West 62nd Street
New York, N.Y. 10029

W. R. CONSEDINE
1312 Massachusetts Ave., N.W.
Washington, D. C. 20005

Attorneys for Amici Curiae

Of Counsel:

F. X. GALLAGHER
1100 One Charles Center
Baltimore, Maryland

ALFRED L. SCANLAN
734 15th Street, N.W.
Washington, D.C.

HARMON BURNS
1785 Massachusetts Avenue, N.W.
Washington, D.C. 20036